80-1011

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

ALWYN T. WYCHE, JR.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

ALWYN T. WYCHE, JR.,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-titled case on October 23, 1980.

QUESTION PRESENTED

Whether petitioner's Fifth Amendment right to trial pursuant to an indictment returned by a grand jury was violated when the trial court instructed the jury they could find petitioner guilty of mail fraud if either of the two named victims specified in the indictment were defrauded although the indictment listed the named victims conjunctively.

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I. Question Presented

Whether petitioner's Fifth Amendment right to trial pursuant to an indictment returned by a grand jury was violated when the trial court instructed the jury they could find petitioner guilty of mail fraud if either of the two named victims specified in the indictment were defrauded although the indictment listed the named victims conjunctively.

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals of the Fifth Circuit in this case is an unpublished opinion cited as United States v. Wyche, Docket Number 79-5620 dated October 23rd, 1980. A copy of the opinion is attached hereto as Appendix I.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 23rd, 1980. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...

STATEMENT OF THE CASE

Petitioner was named in six count indictment alleging six separate violations of the mail fraud statute. As presented, the grand jury charged that petitioner, aided and abetted by his co-defendant secretary, devised a scheme and artifice

to defraud both the AFCO Insurance Financing, Inc. and Thornton & Company, Inc. Thus, two alleged victims were specified by the grand jury as being the objects of the scheme.

The trial court instructed the jury:

> The indictment charges that the scheme was for the purpose of defrauding AFCO Insurance Financing, Inc. and Thornton & Company, Inc. If you find the essential elements to--well, you must therefore find, before convicting Defendant, that he did knowingly devise or intend to devise a scheme and artifice to defraud either AFCO Insurance Financing, Inc. or Thornton & Company, Inc. or both of them. If you find that he did devise such a scheme and all the other elements that I have mentioned are present then you will be authorized to find a verdict of guilty, if he defrauded either AFCO Financing, Inc. or Thornton & Company, Inc. or both.
>
> [Emphasis added].

Petitioner objected to this disjunctive instruction. The court noted, "Your exception is I should have charged it in

the conjunctive. I understand your exception. I anticipated it and I note your exception". A request for a curative instruction was denied, and the jury later returned a conviction on each of the six mail fraud counts.[1]

REASONS FOR GRANTING THE WRIT

ONE

The decision of the Court of Appeals conflicts with the mandate of this Court as pronounced in Ex Parte Bain, 121 U.S. 1 (1887). As Mr. Justice Miller early noted, serious consideration must be given to the proposition that any part of the body of

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[1] A motion for judgment of acquittal had earlier been granted as to petitioner's co-defendant. In such a posture, the court was required to direct a verdict on the conspiracy count naming both petitioner and his co-defendant.

an indictment can be amended without re-submission of the indictment to the grand jury for their approval. Respondent conceeded during trial that it had no evidence to support the allegation that Thornton & Company, Inc. had been defrauded. In light of such a pronouncement, the trial court disjunctively instructed the jury that a verdict of guilt could be found if either named victim was defrauded. The trial court's instruction impermissibly amended the instant indictment and violated petitioner's Fifth Amendment protections. The writ should issue.

TWO

The decision of the Court of Appeals conflicts with decisions of the Ninth Circuit. See, Howard v. Daggett, 526 F.2d 1388 (9th Cir. 1975) and United States v.

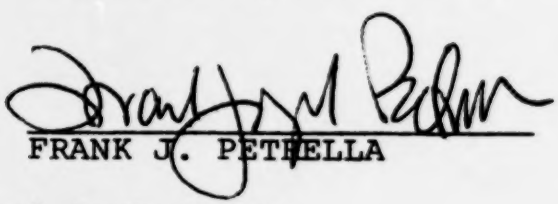
Walker, 575 F.2d (9th Cir. 1978). To insure a uniformity of decisions, these conflicts justify the granting of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari be granted.

This the 22nd day of December, 1980.

Respectfully submitted,

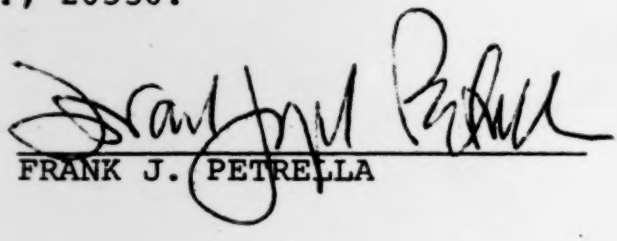


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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 1980 three copies of the foregoing petition for writ of certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C., 20530.



FRANK J. PETRELLA

APPENDIX I

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 79-5620

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALWYN T. WYCHE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(OCTOBER 23, 1980)

Before GEWIN, RONEY and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM: AFFIRMED. SEE:

UNITED STATES V. HAYNES, 610 F.2d 309, 310-11 (5th Cir. 1980); UNITED STATES V. QUIROZ-CARRASCO, 565 F.2d 1328, 1331 (5th Cir. 1978); CUNNINGHAM V. UNITED STATES, 356 F.2d 454, 455-56 (5h Cir. 1966); PRICE V. UNITED STATES, 150 F.2d 283, 284-85 (5th Cir. 1945).

SEE FURTHER LOCAL RULE 21.[1/]

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.